No. 87-2098 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV
SECRETARY OF TRANSPORTATION,
Appellant

v.

MID-AMERICA PIPELINE COMPANY,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF OF NATIONAL TAXPAYERS UNION, NATIONAL ASSOCIATION OF MANUFACTURERS, CITIZENS FOR A SOUND ECONOMY, CONSUMER ALERT, AND AMERICANS FOR TAX REFORM AS AMICI CURIAE IN SUPPORT OF APPELLEE

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National Taxpayers Union ("NTU"), National Association of Manufacturers ("NAM"), Citizens for a Sound Economy ("CSE"), Consumer Alert, and Americans for Tax Reform ("ATR") submit this brief as *Amici Curiae* in support of Appellee Mid-America Pipeline Company. All parties have consented in writing to the filing of this brief, and copies of the consents have been filed with the Clerk.

INTEREST OF AMICI CURIAE

The National Taxpayers Union, Citizens for a Sound Economy, Consumer Alert, and Americans for Tax Reform are nonprofit organizations dedicated to the promotion of economically sound and just government policies in the public interest. NTU, with 150,000 members nationwide, focuses on tax policy, among other issues, as does ATR. Consumer Alert, with 6,000 dues paying members in 50 states, focuses on consumer interest in a broad range of issues, including tax policy questions. CSE, with 250,000 members nationally, focuses on the public interest in a strong, growing economy, which centrally involves tax and budget policies.

The National Association of Manufacturers of the United States is a voluntary business association of approximately 13,500 companies and subsidiaries. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. As a tax exempt business organization, NAM represents its constituency on public policy issues, including tax matters, at the Congressional level. The members of NAM may be directly affected by charges imposed by administrative agencies such as the challenged fee imposed by the Department of Transportation ("DOT"). NAM members already bear a heavy burden in paying corporate income taxes that should support the budgets of regulatory agencies.

All the *amici* work to hold legislators publicly accountable for their positions on tax policy issues. Legislators can evade such accountability, however, if they are allowed to delegate the power to impose taxes to unelected officials. This practice effectively deprives organizations like the *amici* of the ability to perform their functions, and undermines the effectiveness and integrity of the democratic process generally. The *amici* consequently urge this Court to affirm the decision of the court below holding delegation of the power to tax unconstitutional.

SUMMARY OF ARGUMENT

SECTION 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 49 U.S.C. App. 1682a, directs DOT to impose annual charges on pipeline operators to fund Federal pipeline safety programs. While the criteria by which these charges are to be determined may seem concrete and specific, as a practical matter they leave DOT with virtually unfettered discretion to determine who among the pipeline operators shall pay any significant tax and how much each shall pay. The fees imposed by DOT under Section 7005 clearly do not comply with the standards for delegated fees established by this Court in *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974).

The legal standards the government argues should be applied to this case would leave no meaningful limitation on delegation of the taxing power. Allowing delegation of the power to tax would enable elected officials to evade democratic accountability for the exercise of this power, and seriously undermine control over taxation through the democratic process. The Framers recognized this potential problem and therefore carefully and expressly provided that Congress is to exercise the power to tax through a prescribed process. The delegation of the taxation power in this case should consequently be found unconstitutional and the decision of the lower court affirmed.

ARGUMENT

SECTION 7005 OF COBRA UNCONSTITUTIONALLY DELEGATES THE POWER TO IMPOSE TAXES

This case presents the issue of whether Congress can delegate the power to tax to unelected agency officials. Section 7005 of COBRA directs DOT to impose annual charges on pipeline operators to fund federal pipeline safety programs. The Section provides that DOT is to set the amount of the charges "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas or hazardous liquid pipelines." Section 7005(a)(1).[1]

While these criteria may seem concrete and specific, the Magistrate for the court below found that as a practical matter they left DOT with virtually unfettered discretion to set the amount of the charges to be paid by each pipeline company. Jurisdictional Statement at 9a-10a. The amount of the charges for each company would vary dramatically depending on whether the charges were based on volume-miles, miles, or revenues. *Id.* Indeed, with the statutory authority to set the charges based on any combination of these factors, the Magistrate found that DOT effectively has the discretion to impose any burden on individual companies "from 0-100%" of the total fees to be collected. *Id.* DOT, therefore, effectively has the discretion to determine who among the pipeline operators shall pay any significant tax and how much each shall pay. The Magistrate concluded:

> Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go a step further and collect such taxes.

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[1] DOT has chosen to impose the charges on the basis of total pipeline miles operated by each company. 51 Fed. Reg. 25,782, 46,978 (1986)

Jurisdictional Statement at 10a.

The DOT fees clearly do not comply with the standards established by *National Cable*, which distinguish true user fees from taxes. *National Cable* required delegated fees to charge only for specific services providing specific direct benefits individually to each feepayer, benefits "not shared by other members of society." 415 U.S. at 340-341. The amount of such fees are to be limited to the cost of providing such specific, direct services. The DOT fees, however, do not charge for the costs of providing specific services individually benefitting each feepayer. Rather, the fees charge for the costs of Federal pipeline programs which provide broad benefits to the general public, such as safety and public regulation of pipelines. The DOT fees finance management, overhead and administrative costs of the pipeline programs, the costs of funding state grants, the cost of collecting the charges, the costs of bringing civil and criminal prosecutions against pipeline companies, and other costs of the programs. These costs have no relation to any benefit conferred on pipeline operators, and are to be apportioned among them in just about any way that DOT sees fit. The DOT fees, therefore, are clearly taxes rather than fees under *National Cable* and following cases.[2]

The government argues that such delegations of the power to tax are permissible. It says that Congress simply has to announce a general policy, designate the part of the Executive Branch that is to implement it, and set out the boundaries of the Executive's authority. Brief for the Appellant at 6. Under this approach, Congress could delegate to the Internal Revenue Service the power to raise taxes to balance the budget each year, subject merely to limitations such as "the tax burden

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[2] *See, e.g.* Federal Power Commission v. New England Power Company, 415 U.S. 345 (1974); National Cable Television Association v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir. 1976); National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir 1976).

assessed to be reasonably related to ability to pay" or "taking into account likely impacts on the economy", or "the tax shall be assessed based on the taxpayer's income, property, or consumption, or an appropriate combination thereof."[3]

When Congress grants such power to impose broadly discretionary taxes to a federal agency, as in this example or in the case of the DOT fees, fundamental concerns are raised regarding the operation of our democratic process. Senators and Congressmen can avoid democratic accountability if they can delegate the power to tax to unelected officials under the cover of vague generalities. Each of the *amici* is heavily involved in efforts to hold elected officials accountable on tax issues, and can see the impact such delegation would have on their own activities. Holding a legislator accountable requires making voters aware of what the legislator has voted for and against and how that affects them. But such an effort can be shortcircuited if a Senator or Congressman can claim that he or she has simply voted for "fairness" and other generalities in the authorizing legislation, and that the taxes were imposed by a remote agency over which the legislator has no direct control. When the agency has the discretion to choose both who is to be subject to the tax and the amount to be assessed, the opportunity for legislators to deny responsibility is even greater.

The activities of Americans for Tax Reform offer a specific example of the problem. ATR conducts a nationwide Pledge

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[3] Indeed, Congress has already enacted other broad, open-ended delegations of the power to impose charges. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, Section 7601, 100 Stat. 146, 42 U.S.C. § 2213 (delegating the power to impose fees to the Nuclear Regulatory Commission) and the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, Section 3401, 100 Stat. 1890, 42 U.S.C. § 7178 (delegating the power to impose fees to the Federal Energy Regulatory Commission). The precedential effect of the decision in this case must be carefully weighed. If the appellant prevails, Congress may take that result as a signal that it may enact many more, possibly even more open-ended fee delegation statutes to circumvent the difficult process of enacting tax legislation. This would undermine even more seriously democratic accountability and control over the power to tax.

campaign each election year, asking Congressional candidates to pledge not to vote to raise taxes if elected. Hundreds of candidates, both Democrats and Republicans, took the Pledge in 1986 and 1988. But members of Congress can evade the Pledge if they can delegate the power to tax to Federal agencies while disclaiming responsibility for raising taxes. Explaining to the public who should be held accountable in this case and why, and overcoming the legislator's own denial of responsibility, may be impossible. In any event, such an explanatory effort is much more difficult and expensive than communicating that an official has directly voted to increase taxes in violation of the Pledge, in a recorded vote which cannot be denied.

The issue is not merely a matter of the ability of the *amici* to perform their functions. The public interest lies in maximizing the control of the voters over the critical legislative power of taxation. The only way to assure that the taxing power is not abused is to require that those most directly accountable through the democratic process make the decisions regarding taxation. As Chief Justice John Marshall wrote in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819),

> The security against the abuse of this power [of taxation] is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

See also Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 85-88 (1978). Allowing legislators to grant to others the power to impose taxes places an undue burden on the operation of the democratic process and substantially weakens democratic control over the critical taxation power.

This weakening of democratic control is of particular concern when dealing with the power to tax. The very founding of our nation grew out of the insistence of our people

on democratic control over taxation. As Professor James Freedman has written:

> The power to tax is surely one of the most important of the legislative powers created by the Constitution. In the history of other nations, as the Framers had good reason to know, the power to tax had proved strikingly susceptible to oppressive application and abuse .... Rhetoric decrying taxation without representation was a part of the Framers' revoluntary heritage, affording them particular cause to construct protections against the possibility that such a momentous power might come to be exercised by small numbers of men in dark ministries. The decision of the Framers to place the power to impose taxes in the legislative branch of government was a response to these considerations.

Id. at 85. Indeed, the Constitution provides that all tax bills shall originate in the House of Representatives, the body closest to the people. U.S. Const. Art. I, § 7, cl. 1. The Framers consequently indicated precisely their desire to maintain democratic accountability and control over the power to tax and their expectation that all taxation would be imposed by a specific Congressional process, not by delegation.

A recognition of the primary role of democratic processes in controlling taxation likewise underlies the judiciary's traditional reluctance to interject itself into taxation questions. "[T]he responsibility of the legislature is not to the Courts, but to the people by whom its members are elected." *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 548 (1869). See also *McCray v. United States*, 195 U.S. 27 (1904); *A Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *United States v. Kahriger*, 345 U.S. 22, 28 (1953). The remedy for unwise or oppressive taxation "is in the ability of the people to choose their own representatives ..." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 169 (1911). Administrative agency control over taxation, like judicial control, presents the danger of removing accountability from elected representatives.

As a result of these considerations, numerous courts and commentators have suggested that open ended delegations of the power to tax would be unconstitutional.[4] The view of these authorities is essentially that the power to impose charges unrelated to benefits is inherently too broad and without meaningful standards or limitations to be validly delegated.

But even if delegation of the power to tax is not per se unconstitutional, statutes attempting to delegate the critical power to impose taxes should be required to include stricter standards and more limited discretion than other delegations. Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 Harv. L. Rev. 439, 443 (1980). Delegations of fee-setting authority which do not meet the *National Cable* standards, or allow the delegatee broad discretion to determine who shall pay and how much, should be unconstitutional.

Indeed, the usual standards for a permissible delegation should be sufficiently strong to prohibit delegations of broad discretion allowing the choice of who shall pay taxes and how much. Guarding against open-ended delegations is critical to protecting our nation's liberties and democratic system of government. However, if the delegation doctrine is to perform this important function, delegations can only be allowed when the Congress provides truly meaningful standards circumscribing the delegated power, not vague platitudes. Ely, *Democracy and Distrust, A Theory of Judicial Review* 131-134 (1980); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223 (1984); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L.Rev. 1 (1981); Freedman, *Crisis and Legitimacy*, *supra*, p. 7, at 78-94; Tribe, *supra*, n.5, § 5-17, at 362-369.

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[4] *National Cable*, 415 U.S. at 340; Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722,725 (D.C. Cir. 1985); Sohio Transportation Co. v. United States, 766 F.2d 499,503 (Fed. Cir. 1985); New England Power Co. v. U.S. Nuclear Regulatory Commission, 683 F.2d 12,14 (1st Cir. 1982); Mississippi Power & Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1988); Tribe, American Constitutional Law, § 5-17, at 366, n.15 (2d ed. 1988); Freedman, *Crisis and Legitimacy*, *supra*, p. 7, at 88.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

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